Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

George Vilven et al.,

applicants,

and

Air Canada Pilots Association,

respondent,

and

Air Canada,

employer.

Board File: 28780-C
Neutral Citation: 2011 CIRB 615
December 2, 2011

On May 25, 2011, Mr. George Vilven et al. (the applicants) requested that the Canada Industrial Relations Board (the Board) reconsider a decision it had issued on May 4, 2011, *George Vilven et al.*, 2011 CIRB 587 (*Vilven 587*). As one of the grounds for the application is alleged bias on the part of one of the Board members, Mr. Patrick Heinke, this application has been referred back to the original panel of Ms. Elizabeth MacPherson, Chairperson and Messrs. Patrick Heinke and Daniel Charbonneau, Members, for consideration. Although Mr. Heinke's term as a member of the Board ended on May 8, 2011, he has been appointed to the reconsideration panel pursuant to section 12(2) of the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*) because the subject matter of the application relates to a proceeding in which he participated as a member of the Board.

Having reviewed the written submissions of the parties, the Board is satisfied that an oral hearing is not required and has exercised its discretion pursuant to section 16.1 of the *Code* to decide the matter without an oral hearing.

Counsel of Record

Mr. Raymond D. Hall, for Mr. George Vilven et al.,
Mr. Bruce A. Laughton, for the Air Canada Pilots Association and
Mr. Yan Boissonneault, for Air Canada.

I–Background

[1] In *Vilven 587*, the Board dismissed a duty of fair representation complaint that had been filed by Mr. Raymond Hall, on behalf of himself and 75 other Air Canada pilots or former pilots, against the Air Canada Pilots Association (ACPA or the union). The Board found that, on the facts as presented, the union had not breached the duty of fair representation it owed to the applicants by virtue of section 37 of the *Code* when it refused to pursue a grievance on their behalf regarding mandatory retirement, refused to support their complaint under the *Canadian Human Rights Act* (CHRA), and actively opposed the applicants' efforts to strike down the mandatory retirement provisions contained in the collective agreement between ACPA and Air Canada. The Board also determined that the portion of the applicants' complaint that related to an Interim Memorandum of Agreement negotiated by ACPA and Air Canada, which established different terms and conditions of employment for Mr. George Vilven and Mr. Robert Neil Kelly, was moot, as that Agreement became null and void when it was superseded by a decision of the Canadian Human Rights Tribunal (CHRT), *Vilven v. Air Canada*, 2010 CHRT 27.

[2] In the instant application, the applicants ask that *Vilven 587* be quashed and their duty of fair representation complaint remitted to a different panel of the Board for determination. The applicants

allege that the Board made errors of law or policy that cast serious doubt on its interpretation of the *Code* by the Board, and that the Board failed to respect a principle of natural justice, *nemo debet esse judex in propria causa*.

II–Positions of the Parties

A–The Applicants

[3] The applicants argue that the Board erred in law by ignoring, misconstruing and/or failing to accord sufficient deference to the prohibition contained in section 37 of the *Code*, which prohibits a union from acting in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them. The applicants submit that this section of the *Code* is an absolute prohibition that does not permit any justification and that the Board erred in entertaining the union's arguments as to its justification for its actions.

[4] The applicants also argue that the Board failed to properly construe the terms of the collective agreement applicable to Mr. Vilven and Mr. Kelly after the CHRT issued its first decision on their CHRA complaint, *Vilven v. Air Canada* 2009 CHRT 24, on August 28, 2009 (and applicable to all of the members of the bargaining unit after the decision of the Federal Court, 2011 FC 120, on February 3, 2011). The applicants allege that the Board was incorrect when it interpreted the collective agreement as permitting discrimination on the basis of age after those dates and that all of its subsequent deliberations were therefore in error.

[5] The applicants allege that the Board erred in policy by tacitly endorsing the union's behaviour in taking sides in a dispute between two groups of members within the bargaining unit and supporting litigation by the employer; failing to accord any significance to the consequences of the union's decision on the applicants; and failing to consider the complaints in the context of the legislative intent behind section 37 and the quasi-constitutional status of the prohibition against discriminatory conduct.

[6] The applicants also allege that one of the members of the panel that decided their complaint, Mr. Patrick Heinke, was biased, as the biography posted on the Board's website indicates that he was an Executive Member of the Federally Regulated Employers of Transportation and Communication Organizations (FETCO) and a member of the Canadian Chamber of Commerce (CCC) at the time that he participated in the Board's deliberations and decision. Both FETCO and the CCC are involved in lobbying government on behalf of their respective members. In February 2011, both organizations appeared before the House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities to make representations regarding Bill C-481, a Bill to repeal the mandatory retirement provisions of the CHRA and the coincident provisions of the *Canada Labour Code*. In the applicants' submission, Mr. Heinke's membership in these two organizations raises a reasonable apprehension of bias and actual bias in respect of his impartiality to deal with the mandatory retirement issue that was in dispute between the applicants and ACPA. In the applicants' view, Mr. Heinke should have recused himself from the panel and his failure to do so taints the Board's decision.

B–The Union

[7] The union asserts that *Vilven 587* contains no error of law or policy that casts serious doubt on the interpretation of the *Code* and submits that the application for reconsideration should be dismissed. It points to the jurisprudence of the Board, which has consistently held that the Board's role in a duty of fair representation complaint is not to determine whether the union's decision was right, but whether it was made in a manner that was not arbitrary, discriminatory or in bad faith (citing *Fred Blacklock et al.*, 2001 CIRB 139 and *Josée Trudeau*, 2009 CIRB 464). The union asserts that the Board correctly concluded that ACPA's actions in respect of the applicants did not contravene section 37 of the *Code*.

[8] The union submits that the applicants knew that Mr. Heinke was a member of the original panel prior to the date that *Vilven 587* was issued and should have raised any allegations of bias with the original panel. The union notes that the Board conducted a case management teleconference with the parties on January 14, 2011, in which Mr. Heinke participated, and thus the applicants were aware, as of that date, of the composition of the panel. It also asserts that the applicants knew, as of

February 10 and 15, 2011 respectively, that FETCO and the CCC had made representations regarding Bill C-481. In these circumstances, the union submits that the applicants cannot be said to have raised their bias allegation at the earliest practicable opportunity and they should therefore be considered to have waived their objection to the composition of the panel. The union also points out that, since the 1999 amendments to the *Code*, the Board has been representational, as members are appointed after consultation with organizations representative of employees and employers (see section 10(2) of the *Code*). ACPA submits that the applicants have not adduced any evidence to establish that Mr. Heinke's membership in FETCO or the CCC would result in his failing to bring an open mind to the question of whether the union had breached its duty of fair representation to the applicants.

C–The Employer

[9] Employers are not treated as respondents in complaints alleging that a union has breached its duty of fair representation under the *Code*. However, as the employer's interests may be affected by the remedy ordered by the Board in the event that a union is found to have breached section 37 of the *Code*, the employer's submissions are routinely sought when such a complaint is made. In this case, Air Canada made no submissions regarding the applicant's original section 37 complaint or the applicant's allegation that *Vilven 587* contains errors of law or policy. However, the employer did make submissions regarding the allegations of bias against Board member Heinke.

[10] Like the union, the employer submits that the applicants did not raise their allegation of bias at the earliest practicable opportunity and should be deemed to have waived any right to allege bias. The employer suggests that, if the applicants had a serious apprehension of bias regarding Mr. Heinke's participation on the panel seized with their duty of fair representation complaint, they should have raised the issue, at the latest, immediately after the hearings before the House of Commons Standing Committee. Air Canada also submits that, although the respective positions of FETCO and the CCC are not relevant to the issue that the Board had before it, both of these organizations supported the removal of the mandatory retirement provisions in the CHRA and the *Canada Labour Code*.

[11] Air Canada denies that it is a client of Mr. Heinke's, as alleged by the applicants.

III–Analysis and Decision

A–Allegations of Bias

[12] In *Canada (Human rights commission) v. Taylor*, [1990] 3 S.C.R. 892, the Supreme Court of Canada confirmed that allegations of bias must be raised at the earliest practical opportunity. In this case, the parties knew by the date of the case management teleconference on January 14, 2011, that Mr. Heinke was a member of the panel assigned to hear and decide the applicants' section 37 complaint. Mr. Heinke's biography, containing the information about his connection to FETCO and the CCC, had been posted on the Board's website at the time of his appointment to the Board on April 4, 2005 (the Board notes that, in accordance with its standard practice, Mr. Heinke's biography was removed from the Board's website sometime in June or July 2011, following the expiry of his term of office). The applicants knew as of February 15, 2011 that FETCO and the CCC had made representations to the House of Commons Standing Committee regarding the subject of mandatory retirement. *Vilven 587* was issued on May 4, 2011, some 6 weeks later. In the Board's view, there was adequate time for the applicants to have raised any concerns that they might have had regarding Mr. Heinke's participation on the panel prior to the date on which the decision was issued.

[13] Had the applicants raised their allegation of bias on a timely basis, they would have been informed that Mr. Heinke was not a member, nor an executive member, of FETCO or the CCC at the time he sat on the panel that considered the complaint filed by Mr. Vilven and his colleagues. Mr. Heinke has advised the Board that the information on the Board's website reflected his professional background at the time he was appointed to the Board in 2005. His previous participation in both FETCO and the CCC flowed from his former employment as an executive of Air Canada, a role that required him to represent the airline at various business and professional organizations. Mr. Heinke's involvement with FETCO and the CCC ceased when he retired from Air Canada in 2002. Accordingly, the biography on the website erroneously indicated that his associations with those organizations was current, when in fact they had ended in 2002. Mr. Heinke also denies that Air Canada is or was his client, as alleged by the applicants.

[14] The Board takes allegations of bias very seriously, as they call into question the integrity of the Board as well as that of the individual against whom bias is alleged. In *Alain Beaulieu*, 2011 CIRB 570, the Board commented on this issue as follows :

> [18] The applicant alleges that there is a perceived conflict of interest on the part of two members of the original panel, owing to the fact that they had, in the past, held positions with either the respondent union and/or the employer. Allegations of this nature are serious and cannot be taken lightly, as they call into question not only the personal integrity of the individuals, but also the integrity of the Board. The issue of perceived conflict of interest or reasonable apprehension of bias was summarized by the Board in *Emerald Transport, Division of Emerald Agencies Inc.*, 2000 CIRB 91, as follows:
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> > [28] The "test" or standard for determining the disqualification of a panel of the CIRB is that of "reasonable apprehension of bias," which the applicant (Emerald) bears the onus of establishing. This is an objective test, based on whether a reasonable, well-informed person considering all the facts would conclude that there is a real likelihood the decision-maker will favour one party over the other. Proof of actual bias is not necessary. Rather, the possibility or likelihood of prejudice in the eyes of reasonable people is what matters. However, a reasonable apprehension of bias is a question of fact, necessitating an examination of the full circumstances and their specific context.
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> [19] The Board is a representative board. It was described in *Emerald Transport, Division of Emerald Agencies Inc., supra,* as follows:
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> > [22] On January 1, 1999, the Canada Industrial Relations Board (hereinafter the "CIRB") was established as a representative board. The Board is responsible for the interpretation, application and administration of the *Code*. Its full-time complement includes its Chairperson, presently four Vice-Chairpersons, and the maximum of six members of whom three are representative of employees and three of employers. There are also six part-time members of whom equal numbers are representative of employees and employers. All Board members are appointed by the Governor in Council for fixed terms to hold office "during good behaviour." In addition, they are subject to "remedial or disciplinary measures" if found by a formal inquiry "incapacitated from the proper execution of that office by reason of infirmity," "guilty of misconduct," having "failed in the proper execution of that office" or having been placed "by conduct or otherwise, in a position that is incompatible with the due execution of that office."

> [23] Matters coming before the Board may be determined by the Chairperson or a Vice-Chairperson alone or by a tripartite panel comprising either the Chairperson or a Vice-Chairperson together with at least one employee representative and one employer representative. Under section 12.01(1) of the *Code*, the Chairperson has "supervision over and direction of the work of the Board, including the assignment and reassignment of matters that the Board is seized of to panels" and "the composition of panels and the assignment of Vice-Chairpersons to preside over panels."

[20] In *TELUS Communications Inc.*, 2001 CIRB 125, the Board looked at the issues of work experience and the time elapsed since certain members of the panel had been appointed. It stated the following:

> [9] Every member, including every vice-chairperson, has worked with various organizations and employers in order to obtain the expertise required to properly and competently discharge the duties of the adjudicative positions into which they have been appointed. All the Board members have many decades of experience that often include several organizations, employers, industries and professional affiliations on both a local and national level.
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> [10] The Board has taken this preliminary objection extremely seriously, given that the questions implicit in the challenge to the constitution of the panel strike at the very root of the representative structure that Parliament has determined should be applied to the Canada Industrial Relations Board. It has significant implications on the ability of the Board to effectively deal with the hundreds of applications that are filed with the Board each year. Nonetheless, the Board is aware of the pitfalls implicit in a representative Board. The Board has already had a previous opportunity to review the issue in detail involving another Member. In that case this Vice-Chairperson, writing on behalf of another panel of the Board, made a determination on apprehension of bias in which the reasonable apprehension was found to exist (see *Dynamex Canada Inc.*, April 9, 2001 (CIRB LD 432)).
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> [11] The issue, as correctly categorized by the union's counsel, is the issue of *remoteness*, in relation to the perceived affiliation that could be viewed as affecting one's objectivity in adjudication. Is one year affiliation to be considered too close? Is three years too close? Five years or twenty years too close? When is an affiliation with a particular party or individual too close? Does one's previous membership or involvement in an organization or with certain individuals automatically raise the spectre of bias? **The existence of these general past connections do not translate into a reasonable apprehension of bias, without more. There must be a specific basis grounded in fact upon which to justify a concern**.
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> (emphasis added)

> [21] The applicant has not suggested that any of the panel members had a personal relationship with any of the parties to the original complaints or had any personal interest in the outcome of those complaints. The application for reconsideration simply states that, because two of the three members of the original panel worked for either the IAMAW or the employer at some time in the past, the applicant was of the opinion that there was an appearance of conflict of interest on their part.
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> [22] The Board is an expert administrative tribunal. The raison d'être for the appointment of persons with a background in labour relations to the Board is to enable them to use their knowledge and experience to render informed decisions. The *Code* expressly provides that tripartite Board panels will have an employer and an employee representative. These representative members are appointed precisely because of their past experience and expertise in labour relations. Nevertheless, to avoid any apprehension of bias, representative members are normally not appointed to hear any case involving a former employer for a period of at least two years from the date on which they join the Board. Representative members are not appointed to any matter in which they have had a direct interest at any time in the past.

[15] In the instant case, the allegation of bias against Mr. Heinke is not based on his previous employment with Air Canada, which ended in 2002, but is in respect of his alleged membership in two organizations that have lobbied the federal government on the subject of mandatory retirement. Membership in both FETCO and the CCC is by organization, rather than an individual membership. Although Mr. Heinke represented Air Canada at both of those organizations while he was an executive with that airline, his connection with them ceased when his employment with Air Canada ended in 2002. It is unfortunate that the biography posted on the Board's website incorrectly suggested that his past associations with those organizations were still current, but this does not change the fact that he was in no way associated with either FETCO or the CCC for more than eight years before he was appointed to the panel dealing with the applicants' duty of fair representation complaint.

[16] In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, the Supreme Court of Canada provided the following guidance in assessing allegations of bias:

> Impartiality can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. Whether a decision-maker is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. Actual bias need not be established because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.
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> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant

> circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgment of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.

[17] The application of the duty of fairness to administrative tribunals was confirmed by the Supreme Court of Canada in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R 623:

> The duty of fairness applies to all administrative bodies. The extent of that duty, however, depends on the particular tribunal's nature and function. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. Because it is impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision, an unbiased appearance is an essential component of procedural fairness. The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of an adjudicator.
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> There is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts: there must be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members where the standard will be much more lenient. In such circumstances, a reasonable apprehension of bias occurs if a board member pre-judges the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of elected members. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

[18] The application of the test for apprehension of bias to administrative tribunals was further refined by the Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781:

> It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. The statute must be construed as a whole to determine the degree of independence the legislature intended. Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice. However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication.
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> There is a fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts. **Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy.**

> **Implementation of that policy may require them to make quasi-judicial decisions. Given their primary policy-making function, however, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it.** While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not.
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> (emphasis added)

[19] Applying the above-cited tests to these facts, the Board is satisfied that the applicants' allegations have no merit. The applicants allege that Mr. Heinke's participation in FETCO and the CCC raise an apprehension of bias, because both of these organizations are actively engaged in lobbying the federal government on behalf of their constituent members, including Air Canada. Those efforts included submissions to a Parliamentary Committee regarding mandatory retirement. This, the applicants submit, creates an apprehension of bias on Mr. Heinke's part. However, as the facts outlined above reveal, Mr. Heinke has had no connection to FETCO or the CCC since 2002. Furthermore, the issue that was before the Board in *Vilven 587* was whether the union had breached its duty of fair representation to the applicants, not whether the union's position regarding mandatory retirement was right or wrong. Accordingly, the Board is of the view that a reasonable and right-minded person, possessed of all of the information and viewing the matter realistically and practically and having thought the matter through, would not conclude that Mr. Heinke's past associations with FETCO or the CCC would result in bias on his part.

[20] Accordingly, the application for reconsideration of *Vilven 587* on the grounds of apprehension of bias is dismissed.

B–Allegations of Errors of Law or Policy

[21] The applicants also allege that the Board erred in law and policy in its interpretation of section 37 of the *Code*, that it failed to properly construe the terms of the collective agreement applicable to Mr. Vilven and Mr. Kelly after the CHRT issued its first decision on August 28, 2009, and that the Board tacitly endorsed the union's behaviour, failed to take account of the consequences of the

union's decision on the applicants, and failed to consider the complaints in the context of the legislative intent behind section 37 and the quasi-constitutional status of the prohibition against discriminatory conduct.

[22] The Board's approach to duty of fair representation complaints is set out at great length in *Virginia McRae Jackson et al.*, 2004 CIRB 290. The following passages from that decision are instructive:

> [6] The duty of fair representation exists as a counterpart to the union's exclusive authority to deal with grievances under the collective agreement.
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> [8] This relationship involves the negotiation and signing of a collective agreement. All collective agreements negotiated under the *Code* must contain a provision for final settlement of disputes, also known as the grievance procedure (section 57 of the *Code*). Unions enforce the collective agreement by filing grievances that allege that the employer has violated the terms of the collective agreement. Unions have a great deal of discretion when they deal with grievances. They may settle or drop grievances or decide not to refer them to arbitration, even if the affected employee disagrees (see *Fred Blacklock et al.*, [2001] CIRB no. 139).
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> [10] The duty of fair representation is a fundamental part of Canadian labour relations legislations in every jurisdiction, except New Brunswick, and has been the subject of longstanding and consistent interpretation not only by labour boards but by the courts. The principles that govern the union's duty have been enshrined in this quotation from the Supreme Court of Canada in *Canadian Merchant Service Guild v. Guy Gagnon et al.*, [1984] 1 S.C.R. 509:
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> > 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
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> > 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
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> > 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
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> > 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.
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> (page 527)

[11] These criteria are applied in deciding whether a union properly exercised its discretion as to whether to refer an employee's or former employee's grievance to arbitration. In accordance with these criteria, the Board examines the union's conduct as to how the union managed the employee's grievance (see *Vergel Bugay et al.*, [1999] CIRB no. 45; 57 CLRBR (2d) 182; and 2000 CLLC 220-034). This is not an appeal of the union's decision not to refer a grievance to arbitration but an assessment of the union's conduct as to how it handled a grievance (see *John Presseault*, [2001] CIRB no. 138; and *Robert Adams*, [2000] CIRB no. 95; and 73 CLRBR (2d) 132 upheld by *Canadian Council of Railway Operating Unions v. Robert Adams et al.*, judgment rendered from the bench, no. A-719-00, February 13, 2002 (F.C.A.)). The Board rules on the union's decision-making process and not the merits of grievances (see *Gaétan Coulombe*, [1999] CIRB no. 25).

[12] Although the Board does not rule on the merits of an employee's grievance, it may review the facts of a grievance in order to understand whether the union's investigation reflected the worthiness and seriousness of an employee's case (see *Raynald Pinel*, [1999] CIRB no. 19; and *Robert Adams*, *supra*).

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[19] In most collective agreements, employees do not have the absolute right to have their grievance referred to arbitration (see *Garry Little*, [2001] CIRB no. 114), even if this involves serious discipline or termination (see *Yvonne Misiura*, *supra*) or even forced resignation (see *Tadele Lemi*, [1999] CIRB no. 24). Again, the Board's role is to look at the process as to how the union reached its decision (see *Ghislaine Gagné*, [1999] CIRB no. 18).

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[21] It is also essential that a union be able to direct its resources to achieve a maximum effect. In *Judd and C.E.P., Local 2000* (2003), 91 CLRBR (2d) 33, the British Columbia Labour Relations Board expressed the following view, which this Board shares:

> 36. A union must also be able to direct its resources so that they achieve maximum effect. Union resources are limited. If, for example, an employee could insist that his or her dismissal grievance go to arbitration even where on a reasonable assessment there is no such case, this could waste tens of thousands of dollars of the union's resources, which come from employees' dues.
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> 37. Through the control of its resources, a union can leverage them to achieve maximum results for minimum expenditure. An employer knows that the union could take any given case to arbitration if it wished. It also knows that the union is likely to accept a reasonable settlement if one is offered. With that type of relationship, the employer may be motivated to make reasonable offers to settle some matters by agreement, without litigating every issue. In that way, employees achieve the greatest gain with the least expenditure. By contrast, if individual employees could take every grievance to arbitration whenever they wished, the

amount of litigation in the workplace would multiply and employees would very quickly find their collective resources depleted. This type of situation would be detrimental to the workplace and, for employees and the union, unaffordable. It may also place an excessive demand on the employer, affecting the business as a whole.

38. As well, a union must be in charge of making decisions given the reality that what is good for one employee in the bargaining unit may be bad for others. An obvious example is where there is a job vacancy and the collective agreement language is unclear. On one interpretation, one member of the bargaining unit should get the job; on another interpretation, a different member of the bargaining unit should get it. The union cannot represent both members by arguing both interpretations. It must be free to argue the interpretation it feels is in the best interests of the bargaining unit as a whole.

39. For these reasons, among others, unions must act as a single entity in order to represent the employees effectively. They must be able to make decisions even where individual employees in the bargaining unit may disagree. In fact, unions are able to exercise collective power *because* employees cannot simply do whatever they wish individually. It is that characteristic which gives unions their bargaining power on behalf of the employees.

40. Employees choose whether or not to unionize, and typically choose the leadership of their union local. Thus, unions are an exercise in workplace democracy. Like all democracies, they are not expected to be perfect, nor to be free from disagreement. In fact, when one considers the type of decisions unions must routinely make - *e.g.*, whether to expend union resources on a particular employee's grievance, or which position to take when some employees' interests differ from others - it is inevitable that some employees will disagree. Employees as a group may nonetheless decide to continue with their union and its current leadership. If they do, it is not because the employees believe the union has been perfect or right in all cases. It is because they believe it is, overall, the best option available.

[22] In making a decision of whether or not to proceed with a grievance or refer a grievance to arbitration, the union is in fact doing its job of representing employees. It is called upon to assess the workplace conditions that gave rise to an alleged breach of the collective agreement, the interpretation to be given to the collective agreement based on its experience with the employer, as well as the effect of a successful outcome of the grievance on other employees in the bargaining unit. To the extent that this assessment is based on relevant workplace considerations, the union is free to decide the best course of action in a particular set of circumstances.

...

[27] A union must not act in bad faith; that is, with improper purpose. Three examples of this conduct include: the personal feelings of union officers influencing whether or not a grievance should be pursued; conspiring with the employer to have an employee disciplined or terminated; or, putting the ambitions of a group of employees who support a union official ahead of the interests of an individual employee.

[28] A union must not discriminate on the basis of age, race, religion, sex or medical condition. Each member must receive individual treatment and only relevant and lawful matters must influence whether or not a grievance is referred to arbitration. It should be noted that not every instance of differential treatment is considered discrimination. For example, to refer one employee's grievance to arbitration and not another where there are relevant considerations to support the distinction is not discriminatory. Nor is an agreement with the employer to give different or better working conditions to a group of employees because of workplace considerations (see *Mario Soulière et al.*, [2002] CIRB no. 205; and 94 CLRBR (2d) 307).

[29] A union must not act arbitrarily. Arbitrariness refers to actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's arguments or that fail to determine whether the issues raised by its members have a factual or legal basis (see *John Presseault, supra*, but see *Orna Monica Sheobaran*, [1999] CIRB no. 10, that upheld a complaint where the union referred an employee to the employer rather than assist the employee; and *Clive Winston Henderson, supra*, where the union's decision jeopardized an employee's seniority).

[30] It is arbitrary to only superficially consider the facts or merits of a case. It is arbitrary to decide without concern for the employee's legitimate interests. It is arbitrary not to investigate and discover the circumstances surrounding the grievance. Failure to make a reasonable assessment of the case may amount to arbitrary conduct by the union (see *Nicholas Mikedis* (1995), 98 di 72 (CLRB no. 1126), appeal to F.C.A. dismissed in *Seafarers' International Union of Canada v. Nicholas Mikedis et al.*, judgment rendered from the bench, no. A-461-95, January 11, 1996 (F.C.A.)). A non-caring attitude towards the employee's interests may be considered arbitrary conduct (see *Vergel Bugay et al., supra*) as may be gross negligence and reckless disregard for the employee's interests (see *William Campbell*, [1999] CIRB no. 8).

[31] The union's duty in this regard is open to greater scrutiny when a matter involves an employee's termination, serious discipline that affects gainful employment or a disability that requires accommodation. On the other hand, not every grievance warrants an investigation. In some circumstances, the union may already be in possession of the relevant information. Where the evidence before the union is that a grievance is unlikely to succeed, it may be unreasonable in certain circumstances to expect the union to investigate new evidence brought forth by the employee (see *International Longshore and Warehouse Union, Ship and Dock Foremen, Local 514 v. Empire International Stevedores Ltd.*, [2000] F.C.J. No. 1929 (QL) reversing Board's decisions *William Bill Harris*, April 3, 2000 (CIRB LD 209); and *William (Bill) Harris*, [1999] CIRB no. 43; and 57 CLRBR (2d) 216, application for leave to appeal to the S.C.C. dismissed).

...

[33] A union can fulfill its duty to fairly represent an employee by taking a reasonable view of the grievance, considering all of the facts surrounding the grievance, investigating it, weighing the conflicting interest of the union and the employee and then making a thoughtful judgment about whether or not to pursue the grievance. That is called balancing the circumstances of the case against the decision to be made. For example, it is legitimate for the union to consider collective agreement language, industry or workplace practices, or how similar issues have been decided. It is also legitimate for the union to consider the credibility of a grievor, the existence of potential witnesses in support of the grievor's version of the events, whether the discipline is reasonable, as well as the decisions of arbitrators in similar circumstances.

[34] A union can consider legitimate factors other than the employee's interests. For example, the union and the employer may have agreed to a particular interpretation of the collective agreement during the course of collective bargaining or the union may have been unsuccessful at arbitration in a similar case. The union may be concerned that a victory would have an adverse effect on other employees of the unit. The union may decide that the cost of resolving the grievance is too high given the issue at hand. The union must weigh these factors fairly against the wishes of the employee.

...

> [36] The rights that an employee wishes enforced may at times conflict with the rights of other bargaining unit members. This may occur in cases involving seniority rights on promotion or lay-off. This also happens in cases involving a reinstatement that triggers the displacement of another employee. In deciding whether or not to refer a particular grievance to arbitration, the union must act fairly. As long as it has properly considered the interests of both sides, the union need not represent each affected employee.

[23] The applicants' duty of fair representation complaint was filed on August 3, 2010, shortly after Air Canada and ACPA entered into the Interim Memorandum of Agreement (MOA) that established temporary arrangements for the reinstatement of Messrs. Vilven and Kelly in Air Canada's employ. That MOA was subsequently superceded by the November 8, 2010 CHRT ruling that established the remedy for these employees' forced retirement in accordance with the provisions of the collective agreement (2010 CHRT 27). At paragraphs 47 to 62 of *Vilven 587*, the Board considered each of the applicants' arguments in support of their duty of fair representation complaint, and applied the principles set out above. Ultimately, based on the facts before it, the Board found that there had been no breach of section 37 of the *Code*.

[24] While the Board can appreciate that the applicants do not agree with the Board's view of their original duty of fair representation complaint, the Board is satisfied that it correctly applied the above-described law and policy to the facts that were before it in the applicants' complaint.

[25] Board decisions are intended to be final and reconsideration is the exception, rather than the rule (see *Ted Kies*, 2008 CIRB 413). In this case, the applicants have failed to provide any new facts or evidence that would persuade the Board that its original decision was in error. The Board cannot agree with the applicants' argument that section 37 of the *Code* is an absolute prohibition that does not permit any justification and that the Board erred in entertaining the union's arguments as to its justification for its action. As noted above, unions have a great deal of discretion when they deal with grievances and the Board is obliged to look at the entire context when it examines whether the union's decision making process was free of arbitrary, discriminatory or bad faith conduct. In conducting this enquiry, the Board must necessarily consider the union's rationale for the decisions that are alleged to have breached section 37 of the *Code*.

[26] The applicants also allege in their reconsideration application that the Board was incorrect when it interpreted the collective agreement as permitting discrimination on the basis of age after August 28, 2009 (the date of the CHRT decision which held that forced retirement at age 60 violated Mr. Vilven and Mr. Kelly's *Charter* rights). The applicants also argue that because of this error, all of the Board's subsequent deliberations were also in error.

[27] While the Board may take judicial notice of the decisions of other administrative tribunals, it is not bound by those decisions. The Board was therefore not bound by 2009 CHRT 24. However, the Board is bound by the jurisprudence of the Federal Court. In this case, the Federal Court decision confirming the CHRT decision of August 28, 2009, which the applicants rely on in their reconsideration application, was issued on February 3, 2011, long after the date of their original section 37 complaint to the Board and after the close of pleadings in the Board's proceedings. The applicants failed to bring the Federal Court decision to the Board's attention and/or to request that the pleadings be reopened so that the implications of that decision could be addressed.

[28] In any event, the Board is obliged to consider the circumstances that were in existence at the time the alleged breach of section 37 took place. The applicants' original complaint alleged that the union breached their rights under the *Code* as evidenced by the union's refusal to file grievances on their behalf, the position it took in various judicial fora, and the negotiation of the Interim MOA. However, until July 22, 2010 (the date of the Interim MOA establishing separate terms and conditions of employment for Mr. Vilven and Mr. Kelly), the union was interpreting and applying the terms of the collective agreement in a consistent manner to all of the members of the bargaining unit. Notwithstanding the Federal Court's February 2011 decision, the Board cannot retroactively imply different terms and conditions into the collective agreement for the purpose of assessing the union's conduct in representing the members covered by that collective agreement. There was therefore no error in the Board's ruling that, during the period of time that was at issue in the applicants' duty of fair representation complaint, it was not discriminatory for the union to determine that the complainants were not entitled, by the terms of the collective agreement, to be treated differently from any other pilot in the bargaining unit with respect to the age of retirement.

[29] The applicants also allege that the Board erred in policy by tacitly endorsing the union's behaviour in taking sides in a dispute between two groups of members within the bargaining unit and supporting litigation by the employer; failing to accord any significance to the consequences of the union's decision on the applicants; and failing to consider the complaints in the context of the legislative intent behind section 37 and the quasi-constitutional status of the prohibition against discriminatory conduct. However, other than making these bare allegations, the applicants have failed to provide any substantive support for these claims.

[30] As the jurisprudence makes clear, the Board does not rule on whether a union's decision regarding a particular grievance was right or wrong. Instead, the Board looks at the process that the union followed in reaching its decision. As explained above, in conducting this analysis the Board necessarily considers the consequences of the union's decision for the grievors, as well as the consequences for the bargaining unit as a whole. The Board's analysis is also grounded in the legislative intent of all of the provisions in the *Code*, including section 37, and the specific prohibition against discrimination contained in that section. The Board's jurisprudence, as outlined above, clearly indicates that these are all factors that the Board considers in all duty of fair representation complaints, as it did in the applicants' case.

[31] Furthermore, it is inappropriate to suggest that a ruling that dismisses a duty of fair representation complaint implies approval of a union's behaviour, tacitly or overtly. As the Board indicated in paragraph 58 of *Vilven 587*, although it found no violation of section 37 of the *Code*, the Board in no way condoned the union's treatment of the applicants during the time in question and in fact considered it deserving of condemnation.

[32] For all of these reasons, the Board finds no merit in the applicants' request for reconsideration of *Vilven 587*. Accordingly, the application is dismissed.

[33] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Patrick Heinke
Member

Daniel Charbonneau
Member